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TRUSTEE QUARTERLY UPDATE

1 June 2017

TRUSTEE QUARTERLY UPDATE - 1 JUNE 2017

Finance Act receives Royal Assent, but without Money Purchase Annual Allowance Changes

The Finance Act 2017 received Royal Assent on 27 April 2017. In order to pass the Act before the dissolution of Parliament in the run up to the General Election, a number of provisions were dropped. These included the clauses to reduce the money purchase annual allowance (MPAA) from £10,000 to £4,000 from the current tax year onwards, and the clause introducing an income tax exemption for up to £500 worth of employer-provided pensions advice. The Government has said that the dropping of clauses from the Finance Bill does not indicate a change of policy and that it intends to legislate at the earliest opportunity for measures dropped from the Bill. This begs the question whether the Government will still seek to reduce the MPAA for the current tax year or only for future tax years.

Clauses making changes to the tax rules around transfers to qualifying recognised overseas pension schemes (QROPS), as announced in the Budget on 8 March 2017, were included in the Act. For more detail on the QROPS changes, see our Budget e-bulletin.

Pension Schemes Act 2017 (introducing new master trust rules) receives Royal Assent

In our December 2016 Update we reported on the Pensions Schemes Bill introducing a prohibition on operating a master trust scheme (MTS) without authorisation from the Pensions Regulator. On 27 April 2017 the Bill received Royal Assent to become the Pension Schemes Act 2017.

MTS is defined as an occupational pension scheme which

(a) provides money purchase benefits (whether alone or in conjunction with other benefits),

(b) is used, or intended to be used, by two or more employers,

(c) is not used, or intended to be used, only by employers which are "connected" with each other, and

(d) is not a relevant public service pension scheme.

The Act contains a broad regulation-making power to enable the Government both to extend the Act's provisions to schemes that would otherwise fall outside its scope and to exempt schemes that would otherwise be caught.

The requirement for a MTS to be authorised has not yet been brought into force. The Government intends to commence the master trust authorisation regime in full from October 2018. However, the requirement to notify the Pensions Regulator of specified "triggering events" **is** now in force. Broadly, triggering events are events which may prevent the scheme from continuing to operate in its current form, e.g. insolvency of the entity responsible for providing funds to operate the scheme. The triggering events provisions are retrospective to 20 October 2016 (the date the Bill was published) and a triggering event occurring after that date has to be notified to the Regulator within 7 days of its occurrence. The person with the legal obligation to notify a triggering event will generally be the person who is entitled to any profits from operating the scheme, or who is obliged to provide funds to operate the scheme if member administration charges are not sufficient.

New General Levy Rates introduced for large schemes

Regulations have been passed reducing the rate of the General Levy for schemes with 500,000 or more members. The new levy rate for such schemes is 65p per member (compared to 86p per member previously), subject to a minimum levy of £430,000. The General Levy rates for schemes with less than 500,000 members are unchanged. The General Levy (not to be confused with the PPF Levy) funds the core running costs of the Pensions Regulator, the Pensions Ombudsman and TPAS.

NEST transfer restrictions and contribution limits lifted

With effect from 1 April 2017, changes to the rules governing NEST took effect, removing the prohibition on transfers to and from NEST and the limit on the amount of contributions that can be made to NEST. NEST is the pension scheme established by the government to ensure that there would always be a scheme available which employers could use to comply with their auto-enrolment duties.

Judge suggests increase to Ombudsman compensation limits

In the case of Baugniet v Capita Employee Benefits Ltd, the judge suggested that it would be appropriate to increase the upper limit for Pensions Ombudsman compensation awards for non-financial injustice. Current Ombudsman guidance states that in most cases, redress for non-financial injustice is likely to range from £500 to £1000. The figure of £1000 reflects a 1998 judgment which held that an award in excess of £1000 for non-financial loss should not be made absent very exceptional circumstances.

In the recent judgment in Baugniet, the judge noted that the judgment suggesting a £1000 cap was given almost 20 years ago. The judge said that in his view it would be appropriate to re-base the upper limit for compensation in non-exceptional circumstances at £1600. This figure is based on the figure produced by the Bank of England's online inflation calculator as to the equivalent value in 2017 of £1000 in 1998.

The Pensions Ombudsman has not formally updated his guidance, but in the light of the Baugniet judgment, trustees should be aware of the possibility of awards of up to £1600 being made in respect of non-financial injustice in non-exceptional circumstances.

Data protection: Court holds data subject access regime subject to principle of proportionality

Pension scheme trustees sometimes have to deal with data subject access requests (SAR) where a member makes a request under data protection legislation that the scheme trustees disclose all personal data held about the member. The case of Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd was not a pensions case, but required the court to consider the scope of its discretion whether to order a data controller to provide information in response to a SAR, in particular where gathering all data and presenting it in a legally compliant form would involve a lot of work.

The court held that its discretion was subject to a principle of proportionality. Factors to be taken into account included: whether any breach of the legislation was serious or trivial; whether there was a legitimate reason for having made the SAR; whether the individual making the request was really doing so to obtain documents (e.g. in the context of litigation) rather than in order to check the accuracy of the data held; and whether litigation was being pursued merely to impose a burden on the data controller.

Once the General Data Protection Regulation comes into force on 25 May 2018, trustees will be required to comply with a first SAR from a member free of charge. (Current legislation allows trustees to charge a £10 fee). This may result in trustees having to deal with a higher number of SARs.

Court rules on correcting benefits where new pension increase rule breached amendment power

The Court of Appeal ruling in Dutton v FDR involved a case where the parties believed that they had replaced one pension increase rule in its entirety with another, but did not appreciate that this breached a restriction on accrued rights in the scheme's amendment power.

The original increase rule provided for increases at 3% pa compound, the second for RPI increases capped at 5%. The Court of Appeal had to consider the correct methodology for calculating pension increases in relation to the element of the pension that benefited from both the new rule and the amendment power restriction in the original rule. Overturning the High Court decision, it held that the correct approach in any given year was to calculate (a) what that element of the pension would be if the old rule applied throughout the period from retirement up to and including the year of increase; and (b) what that element of the pension would be if the new rule applied throughout the period from retirement up to and including the year of increase. The amount provided should then be the higher of the two. (The trustees had put forward two alternative approaches which had the potential for the member to get "the best of both worlds" in any given year.)

British Airways PLC v Airways Pension Scheme Trustee Limited

On 19 May 2017, the High Court gave judgment in relation to the long running litigation between British Airways (BA) and the trustees of its pension scheme. The background to the litigation was the decision by the Government in 2010 to change the statutory basis for calculating pension increases from RPI to CPI. The drafting of the BA scheme rules meant that this would result in future increases under the BA scheme being based on CPI rather than RPI. Unusually, the Scheme's amendment power, which was exercisable by the Trustees, did not stipulate that employer consent was to an amendment was required. The Trustees amended the Scheme to give themselves a discretion, exercisable by a two thirds majority, to grant additional increases to those already provided by the Scheme rules. They subsequently exercised that power to award an additional increase.

BA challenged the Trustees' actions. Broadly, its arguments were (a) that the Trustees did not have the power to amend the Scheme as they had done; and (b) even if they did have the power to amend the scheme, they had not properly considered the exercise of their discretion, instead adopting an inflexible policy that discretionary increases should be awarded. After considering in great detail the events leading up to the award of the discretionary increase, the judge rejected BA's arguments in this respect.

Much of the lengthy judgment is concerned with matters which were very scheme/fact specific, but one notable point of broader application is that the Scheme was in deficit at the time the discretionary increase was awarded under the Trustees' newly added discretion. The judge accepted that the existence of the deficit and the wishes of BA were "highly relevant" considerations for the Trustees to take into account in the exercise of their discretion, but neither of these factors prevented the trustees from exercising their discretion in the way they had done.

Although it is relatively rare for a scheme amendment power to be exercisable by the trustees alone without employer consent, it is more common for scheme rules to give the trustees discretions in specific areas. This judgment is potentially significant where trustees are considering exercising a discretion in a way that will increase scheme liabilities without employer consent.

It has been reported that BA plans to appeal.

Court considers RPI wording in pension increase rules

In the case of Thales UK Limited v Thales Pension Trustees Limited, the court had to consider the meaning of a pension increase rule with the following wording: "If the Government retail prices index for all items is not published or its compilation is materially changed, the Principal Employer, with the agreement of the Trustees, will determine the nearest alternative index to be applied." The judge held that there had been a material change to the compilation of RPI, meaning that the Principal Employer and the Trustees had to agree the "nearest alternative index to be applied". However, he held that the "nearest alternative index" was RPI in its revised form (not CPI).

Trustees could not rely on exoneration clause re failure in relation to investment duties

The case of Dalriada Trustees Ltd v Mcauley involved a claim brought by a scheme's current trustee against two former trustees. The current trustee had been appointed, and the former trustees removed, at the instigation of the Pensions Regulator due to pensions liberation concerns. During the trusteeship of the former trustee, over £3 million pounds had been paid from the fund under "Gilt Option Agreements" (the Agreements). The terms of these were quite complex, involving various offshore companies and payments to various different parties. The judge found that in order for the pension scheme merely to recoup the original sum invested, one of the companies involved would have needed to make returns in the order of 1300%.

It is a basic principle of trusts law that trustees have a duty to take care in relation to the investment of trust monies. Under section 33 of the Pensions Act 1995, a trustee's liability for its obligation to take care or exercise skill in the performance of its investment functions "cannot be excluded or restricted by any instrument or agreement".

The judge held that it was clear beyond any reasonable argument that the payments in respect of the Agreements were not investments that a trustee exercising proper skill and care could make. Factors cited in support of this finding were: the very large return which would be required under the Agreements before there would be any return to the scheme; the Agreements involved payments to offshore entities in respect of a highly speculative business; over 80% of the funds were to be paid to another entity under a consultancy agreement; there was no evidence that the trustees gave any consideration to diversifying their investments; and there was no evidence that the trustees had taken proper advice.

Applying section 33 of the Pensions Act, the judge held that, in relation to the breach of their duty to exercise proper skill and care in relation to their investment functions, the trustees could not rely on the exoneration clause in the scheme's trust deed.

Court considers meaning of "segregated scheme" under the Employer Debt Regulations

In the case of Engineering Construction Industry Training Board v Swift, the court was asked to consider the definition of a "segregated scheme" for the purposes of the Occupational Pension Schemes (Employer Debt) Regulations 2005, which deal with the issue of when a debt on the employer is triggered under section 75 of the Pensions Act 1995 in relation to a multi-employer scheme. The regulations provide that in relation to a multi-employer "segregated scheme", the regulations shall apply to each section of the scheme as if that section were a separate scheme. One of the conditions for a scheme to be a "segregated scheme" is that "a specified proportion of the assets of the scheme is attributable to each section of the scheme and cannot be used for the purposes of any other section".

The scheme in question had a defined benefit section and a money purchase section. The court was asked to decide whether those sections should be treated as separate schemes under the Employer Debt Regulations by virtue of the scheme being a "segregated scheme". The scheme's trust deed allowed expenses of the defined benefit section to be paid from the money purchase section. The court held that meant the scheme was not a segregated scheme, as the condition that the assets of one section could not be used for the purposes of another section was not satisfied.

GMP Equalisation: Court case and response to consultation

In our December 2016 Update, we reported that the Government was consulting on a proposed methodology for equalising GMPs for male and female members. In March 2017, the Government published a response to the consultation.

According to the response, the Government's latest proposed GMP equalisation methodology has been much more positively received than its previous attempt, but respondents have raised a number of significant issues which the Government will now discuss with a working group seeking to address the issue of GMP equalisation. The Government has not given any timescale for publishing further guidance or amending legislation.

The Government is not planning to legislate for any form of "safe harbour" for GMP equalisation, i.e. it will not legislate to prevent claims being brought against schemes that use the proposed methodology.

The Government does not appear minded to use the UK's exit from the EU as an opportunity get rid of the issue of equalising GMPs. The consultation response not only refers to the fact that the UK is currently still a member of the EU, but also makes reference to the fact that the obligation to equalise pension benefits has been incorporated into UK legislation.

Since publication of the Government's GMP consultation response, the trustee of Lloyds Bank's pension schemes has announced that it will be applying to court for directions as to whether GMP equalisation measures are required in relation to the schemes and, if so, how equalisation should be achieved. This case could have ramifications for all pension schemes with GMPs. The court is not expected to hear the matter until 2018.

PPF consults on its Levy policy for 2018/19 to 2020/21

The PPF has consulted on its policy for the "Third PPF Levy Triennium", i.e. the Levy years 2018/19 to 2020/21. The PPF is planning some changes around "Type A" contingent assets, i.e. where an employer's liabilities are guaranteed by another group company in order to reduce the levy. The PPF is planning to issue revised standard form contingent asset documents, and is intending to require that **existing** contingent assets are amended or re-executed so that they are on the revised standard terms. In addition, the PPF is proposing to require trustees to obtain a guarantee strength report prepared by a professional adviser where the "realisable recovery" figure is certified at £100 million or higher.

The PPF's proposals are currently at consultation stage, but trustees of schemes with contingent assets should monitor for developments in this area. We will cover the PPF's final decision on the contingent asset issue in a future Update.

PPF publishes 2017/18 Levy Rules, plus Policy Statement on schemes without a substantive employer

On 30 March 2017, the PPF published it final form Levy Rules for the levy year 2017/18, together with its Policy Statement regarding a specific levy rule for schemes without a substantial employer.

PPF plans to raise Fraud Compensation Levy in 2017/18

The PPF has announce in a press release that it plans to require payment of a Fraud Compensation Levy for the first time in five years. The Levy will be set at 25p per member.

PPF ordered by Ombudsman to give detailed reasons for its refusal to partially recognise contingent asset

In a determination regarding the Massey Ferguson Works Pension Scheme (PPFO-9577), the Pensions Ombudsman has ordered the PPF to provide detailed reasons for its decision not to grant partial recognition of a guarantee as a contingent asset. The Scheme had submitted details of a guarantee from the scheme employers' parent company to the PPF and applied to have this recognised as a "Type A" contingent asset for the purpose of obtaining a reduction to the Scheme's PPF levy. The PPF rejected the application on the grounds that the majority of the guarantor's assets comprised investments in its subsidiaries and that the Trustees had not demonstrated that the guarantor would be able to release sufficient value from non-employer subsidiaries, in the event of an employer insolvency, to meet its guarantee obligations. The Trustees applied to the Ombudsman for a review of the decision.

The Ombudsman concluded that the PPF's decision not to grant **full** recognition to the contingent asset was not perverse, so did not require the PPF to review its decision in that respect. If the PPF declines to give full recognition to a contingent asset, it has a discretion to partially recognise the asset. There was no record of the PPF having considered exercising its discretion in this respect, and the information provided by the PPF in this respect was contradictory. Initially, the PPF had said it did not consider partial recognition of the contingent asset, and would generally only consider this if it was submitted as a ground for review. However, following receipt of an opinion from one of the Ombudsman's adjudicators, it said that partial recognition was considered as part of its initial financial assessment of a contingent asset, and as part of its review and reconsideration process, and that its grounds for refusing full recognition applied equally to partial recognition.

The Ombudsman expressed concern regarding the PPF's lack of transparency regarding the purported exercise of its discretion regarding partial recognition. This had meant the Trustees had not had an appropriate opportunity to query the PPF's decision in this respect. He ordered the PPF to provide the Trustees with detailed reasons for the decision not to grant partial recognition of the contingent asset, and to give the Trustees the opportunity to request a review and reconsideration of the decision.

Regulations to enable transfer of contracted-out rights where schemes in PPF assessment period

Regulations coming into force on 3 July 2017 will enable transfers of pensioners' GMPs or section 9(2B) rights from a scheme in a PPF assessment period to a scheme that has never been contracted-out. Member consent will be required for such a transfer. The regulations will also apply where a scheme has entered into a "regulated apportionment arrangement" (a type of arrangement for apportioning the employer debt under section 75 of the Pensions Act 1995 where the employer is expected to become insolvent within the next 12 months).

A broader issue which has arisen since the abolition of contracting out is that it is not possible to make a transfer without consent of GMPs or section 9(2B) rights to a scheme that has never been contracted-out. This can impede restructurings where the parties wish to transfer pension rights to a new scheme, as it is no longer possible to establish a new contracted-out scheme. The Government says that it intends to consider this issue "in the near future".

Transfer refusal not maladministration despite incorrect legal interpretation

In his determination in the case of Mr N (PO-5395) the Ombudsman has held that a pension scheme administrator was not guilty of maladministration for refusing to make a transfer requested by a member based on its interpretation of the law at that time, notwithstanding that its interpretation had subsequently been held by the courts to be incorrect.

At the time of the transfer request (2013), the issue of pensions liberation was receiving attention, and the Pensions Regulator had suggested that schemes should make checks before making transfers. However, there had been little guidance available as to what features justified a refusal to make a transfer. When the issue had been considered by the Ombudsman in 2015, the Ombudsman had held that a member had to be in receipt of earnings from a receiving scheme employer in order to have a statutory right to transfer. This criterion was not satisfied in relation to Mr N's proposed receiving scheme, which had been set up purely in order to receive the transfer, so had Mr N complained in 2015, the Ombudsman would not have upheld the complaint. Subsequently the court had held, in the case of Hughes v Royal London, that the Ombudsman's interpretation was incorrect, and that earnings from any source were sufficient to give a member a statutory right to a transfer value. However, as the transferring scheme administrator's approach had been in line with the Ombudsman's thinking at that time, its incorrect interpretation of the law was not maladministration and the Ombudsman did not uphold the complaint. However, the Ombudsman did say that the scheme administrator should now review its position if Mr N still wished to transfer.

Ill-health retirement: Ombudsman considers whether new medical evidence should be considered on review

In the case of Ms R (PO-9995) the Ombudsman has considered the extent to which a decision-maker reviewing a decision whether to grant ill-health early retirement should take into account medical evidence that was not available at the time of the original decision.

The case involved the NHS Pension Scheme which provides two tiers of ill-health retirement pension depending on whether a member is permanently incapable of performing his usual job (the test for a "Tier 1" ill-health pension) or whether he is also permanently incapable of "regular employment of like duration" (the "Tier 2" test). Following a knee injury, the member's application for an ill-health pension was initially declined in relation to both Tier 1 and Tier 2. The member complained under the scheme's internal disputes resolution procedure (IDRP). At stage 1 of the IDRP the member was awarded a Tier 1 pension, but not a Tier 2. This decision was upheld at the second stage of the IDRP. The case was complicated by the fact that the member suffered from a number of health problems, and new information relating to the member's state of health had become available after the original decision whether to grant an ill-health pension.

The Ombudsman confirmed that the decision-maker under the IDRP was not required to look at medical evidence in respect of new conditions or deterioration of the original condition that had occurred or become available after the initial decision was made. However, the decision-maker should take into account medical evidence which became available at a later date, but related to the member's condition at the time of the original decision. The Ombudsman upheld the decision-maker's ultimate decision, but ordered a payment of £500 to compensate the member for the distress and inconvenience which she suffered as a result of the initial wrong decision not to grant her any ill-health pension at all.

Conservatives propose new powers for Pensions Regulator

A Conservative party press release issued on 30 April 2017 says that a Conservative government, "will give the Pensions Regulator the power to scrutinise takeovers and unsustainable dividend payments that threaten the solvency of a company pension scheme."

The press release goes on to state, "Under our plans, any company pursuing a merger or acquisition valued over a certain amount or with over a certain number of members in the pension scheme would have to notify the Pensions Regulator, who could then apply certain conditions. In cases where there is no credible plan in place and no willingness to ensure the solvency of the scheme, the Pensions Regulator could be given new powers to block a takeover. This would include the power to issue punitive fines for those found to have wilfully left a scheme under-resourced."

The press release indicates a greater enthusiasm for extending the Regulator's powers than was apparent from the Green Paper on Defined Benefit Schemes published by the Government in February. For more detail on the Green Paper, see our e-bulletin.

Annual funding statement

On 15 May 2017, the Regulator published its annual funding statement. The statement is primarily aimed at schemes undertaking valuations with effective dates in the period 22 September 2016 to 21 September 2017, but is relevant to all defined benefit schemes. Following the collapse of BHS, the Regulator's approach to scheme funding issues came under scrutiny. The overall tenor of the statement is that the Regulator intends to be clearer about its expectations of trustees in relation to scheme funding and will take a more proactive approach to scheme funding issues, including late valuations. The Regulator is particularly likely to intervene if it considers that payments to shareholders are being unduly prioritised over contributions to an underfunded scheme.

The statement says that many schemes are likely to have larger funding deficits than projected in their last valuation, and that all schemes need to put contingency plans in place to address potential risks. Where schemes find themselves with a worse funding position than anticipated, the Regulator expects them to implement their contingency plans.

Regulator expectations dependent on scheme and covenant strength

The Regulator has segmented schemes according to their risk profile and has the following expectations:

- schemes in a relatively strong position in terms of funding position and employer covenant strength are expected, as a minimum, not to extend their recovery plan end date "unless there is good reason to do so";
- schemes with reasonably strong employers, but long recovery plans, are expected to seek higher contributions now to mitigate against the risk of the employer covenant weakening;
- schemes that assume they have a strong covenant despite a weak employer due to support from stronger group companies are expected to seek **legally enforceable** support.

For schemes where the employer is unlikely to be able to support the scheme ("stressed schemes"), the Regulator recognises that the option with the least detrimental impact on members' benefits may be to continue the scheme notwithstanding the potential cost to the PPF. Where trustees have little or no scope to make further use of flexibilities in the funding regime, the

Regulator expects them to "reach the best possible funding outcome taking into account members' best interests and the scheme's specific circumstances".

The Regulator says that trustees of stressed schemes need to be able to fully evidence that they have taken at least the following measures:

- the employer closing the scheme to future accrual where it has not already done so;
- testing the strength of the employer covenant to support scheme risks and considering whether any dividend payments made or due to be made limit the ability of the employer to support the scheme and invest in sustainable growth;
- maximising non-cash support and security available to the scheme from the employer and, where there is one, the wider group;
- identifying scheme risks and improving the scheme's ability to control these risks; and
- where scheme rules allow, considering whether the scheme should be wound up.

Notifiable events

The Regulator states that it expects employers to provide scheme trustees with early warning of employer-related events, e.g. a decision by an employer to cease business in the UK.

Discount rate assumptions

The Regulator says it is not prescriptive about the approach trustees should take when setting the discount rate for a scheme's valuation, provided the outcome is consistent with legislation and the Regulator's DB code. The Regulator expects trustees to document their rationale for selecting the method used to set the discount rate.

Risk management

The Regulator expects trustees to take decisive action where the scheme's funding position has been on a downward trajectory for more than one valuation or if they have faced "any significant adverse impacts". The Regulator says trustees need to have a contingency plan in place detailing actions they would need to take to correct the scheme's position in the event of a downside risk materialising. The plan should be agreed with the employer in advance and be legally enforceable.

Regulator's approach

The Regulator says it will be "placing more focus on proactive casework" and improving the way it identifies cases that present the biggest risks to members, intervening early before recovery plans are submitted. In particular, the Regulator intends to intervene where:

- recovery plan end dates are being extended unnecessarily; and/or
- the employer covenant is constrained, and payments to shareholders are being prioritised at the expense of contributions to the scheme.

Specifically, where an employer's total distribution to shareholders is higher than deficit reduction contributions to the scheme, the Regulator expects the scheme to have a relatively short recovery plan. It also says that the investment strategy should not rely "excessively" on investment outperformance.

Late valuations

The Regulator plans to take a tougher approach where schemes fail to submit valuations on time. The statement says trustees should plan to avoid unnecessary delays. It is more likely to take enforcement action where delays could have been predicted or trustees fail to engage with the Regulator.

Investment guidance for DB schemes

On 30 March 2017, the Pensions Regulator published investment guidance for trustees of defined benefit schemes. The guidance contains sections on: governance; investing to fund defined benefits; matching liabilities; growth assets; implementation considerations; and monitoring defined benefit investments.

Consultation on monetary penalties and professional trustee description

The Regulator has consulted on its policy regarding imposing monetary penalties, and also its proposed definition which it intends to apply for the purposes of determining whether a trustee is a professional trustee and as such should be expected to have a greater level of knowledge than a lay trustee.

The Regulator considers a professional trustee to include any person, whether or not incorporated, who:

- acts as a trustee of the scheme in the course of the business of being a trustee; or
- is an expert, or holds themselves out as an expert, in trustee matters generally.

White Paper on Great Repeal Bill

On 30 March 2017 the Government published its Brexit White Paper. This announced a "Great Repeal Bill" to repeal the European Communities Act 1972 on the day the UK leaves the EU. The Bill will convert EU law applicable in the UK on the day the UK leaves the EU into domestic law, so that "wherever practical and sensible", the same laws and rules will apply immediately before and immediately after departure.

Decisions by the Court of Justice of the European Union (CJEU) as at the day the UK leaves the EU will be given the same status as UK Supreme Court decisions. The Supreme Court normally follows its own decisions, but does in rare cases depart from them "when it appears right to do so". The Government does not intend the CJEU to have any jurisdiction within the UK after it leaves the EU, nor does it intend to require UK courts to consider CJEU decisions made **after** the UK's exit from the EU.

The Government acknowledges that a significant amount of EU law will not work without amendment once the UK has left the EU, e.g. it may be predicated on UK membership of an EU regime. The Bill will therefore create a power to "correct the statute book where necessary" to rectify such problems via broad powers to pass regulations.

The White Paper specifically covers "Workers' rights and equalities" confirming that the incorporation of EU law into domestic law will maintain workers' rights enjoyed under EU law once the UK has left the EU, and that the protections of the Equality Act 2010 will continue to apply.

Cap on early exit charges and prohibiting member-borne commission charges

The Government has consulted on draft regulations to cap early exit charges and prohibit existing member-borne commission charges in occupational schemes. The draft regulations have a coming into force date of 1 October 2017.

The early exit charges cap will apply to money purchase benefits under occupational schemes (other than certain small schemes). Broadly, an "early exit charge" is a charge imposed on a member who takes, transfers or converts his benefits where the charge only applies on the member taking such action before his normal pension age. For members who join a scheme on or after 1 October 2017, such charges will be prohibited outright. For members who joined before that date, such charges will be limited to 1% of the value of the affected benefits (or, if lower, the amount provided for under the scheme rules as at 1 October 2017). The statutory limits will override any conflicting contractual term. Any person who provides administration services directly to the trustees will be obliged to write to them within one month of 1 October 2017 to confirm that it is compliant with the charges cap.

The prohibition on existing member-borne commission arrangements in schemes used for automatic enrolment represents the second stage of the member-borne commission ban, which already applies to arrangements entered into on or after 6 April 2016. The draft regulations provide that from 1 October, the ban will apply to affected schemes regardless of when the arrangement was entered into. Broadly, the member-borne commission ban covers member charges:

- used to pay an adviser for services provided to the member or employer; or
- to reimburse a person providing administration services to the scheme for payments made by that person to an adviser.

Where the prohibition applies, it will override a conflicting contractual term. A person providing administration services to the scheme will be obliged to confirm in writing to the trustees that it is complying with the prohibition.

Changes to Employer Debt Regulations

The Government has recently consulted on draft regulations to introduce a new way to avoid triggering a "section 75 debt" on an employer that ceases to employ any active members of a multi-employer scheme. For more detail, see our e-bulletin.

Three year extension to pension fund EMIR exemption

The European Commission has proposed an amendment to the European Market Infrastructure Regulation (EMIR) which will exempt pension schemes for a further three years from the requirement to centrally clear over-the-counter derivative transactions. Under Article 50 of the Lisbon Treaty, the UK is due to leave the EU in 2019 (unless an extension to this period is agreed) so it appears likely that the UK will have left the EU before the central clearing requirement comes into force in relation to pension schemes.

Pensions Dashboard

The ABI issued a press release on 17 May 2017 announcing that it will establish and lead an interim phase of the Pensions Dashboard project, the aim of which is to enable individuals to view details of all their pension pots online in a single place. The press release says that the Government's objective is for the service to be available to consumers by 2019, and for it to be offered by a range of different organisations rather than by a single, central service.

New PSC register filing requirements

In our March 2016 Update we reported on the requirement being introduced from 6 April 2016 for non-listed companies to keep a register of "people with significant control" (PSC) over the company. Until now the legal requirement has been for companies to keep the PSC register up-to-date and to file details with their check and confirm statement. From 26 June 2017 the requirements are due to change so that companies will have to notify Companies House within 14 days of making a change to the PSC register. Corporate pension scheme trustees will need to ensure they comply with the new requirements.

HMRC Newsletter on Scottish Rate of Income Tax

On 12 May 2017, HMRC published a newsletter on the Scottish rate of income tax. The introduction of the Scottish rate of Income Tax means that pension scheme members receive tax relief on their contributions based on their residency tax status. For scheme administrators operating relief at source pension schemes, if the Scottish rate of Income Tax differs from the rest of UK rate, this affects the amount of tax relief given to each member. The newsletter says that from January 2018, HMRC will tell pension scheme administrators operating relief at source pension schemes their individual scheme members' residency tax status.

The newsletter says HMRC is aiming to develop a "look up service" that scheme administrators can use to check a member's residency status for tax purposes when the member joins the scheme. HMRC aims for this to be available before the start of the 2018/19 tax year.

ICAEW guidance on realised and distributable profits has significant pensions implications

On 7 April 2017, the Institute of Chartered Accountants in England and Wales and the Institute of Chartered Accountants of Scotland published TECH 02/17, which provides updated guidance on realised and distributable profits under the Companies Act 2006.

The guidance contains some significant new wording in relation to pensions. It states that the transfer of a pension scheme surplus or deficit between group companies for a non-arms-length sum may, as a matter of law, involve a distribution. The guidance states that, "it is clear that a distribution can arise from the assumption, from a parent or fellow subsidiary or similar, of a liability owed to a third party if the company does not receive consideration of the same value. That is because the liability commits the company to transfer assets at the due date and its assets are therefore reduced when entering into the commitment." This could be significant in the context of "flexible apportionment arrangements" under which one scheme employer assumes the liabilities of another employer that is ceasing to participate in the scheme, thus allowing the departing employer to avoid having to pay the statutory debt for which it would otherwise be liable under section 75 of the Pensions Act 1995.

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